liable in money damages for the harm done to property, which it was the purpose of the injunction to prevent.

The development of this question in England is interesting. In the leading case on the point, *Taff Vale Ry. v. Amalgamated Society of Ry. Servants,*[21] it was held that a trade union could be sued in its registered name and its funds were amenable to actions in tort for damages occasioned by acts of its members. The result was a greater participation by labor in politics with a coincident growth in a class consciousness among laborers. Within five years after the *Taff Vale* decision, the labor party secured the passage of the Trade Disputes Act of 1906,[22] which largely nullified the effect of that decision.[23] It may be that the *Coronado* decision will have a similar effect in this country, though such a consequence is quite unlikely, for class consciousness among laborers here is as yet not strong enough. It has been suggested, and wisely, that "how to deal with the causes underlying these conflicts is the real question confronting law no less than labor, and not the recognition by law of the reality of trade unions."[24]

EQUITABLE RELIEF AGAINST FORFEITURES IN LAND SALES

Suppose that A and B enter into an executory contract for the sale of land in which payments are to be made in instalments. By express stipulation time is declared to be "of the essence," and a condition is inserted that upon the vendee's default to make a payment, all sums previously paid are to be considered as forfeited. If A pays but a small portion of the purchase price and then defaults, or pays all but one hundred dollars of the total amount and then fails to pay an instalment, will equity afford relief in either situation under the doctrine that equity abhors a forfeiture?

Generally, in the case of a contract for the sale of land, equity will not treat time as of the essence, but will permit one who has suffered the time for payment to elapse to pay after the prescribed date and compel a performance by the other party notwithstanding his own delay; provided, of course, that equitable grounds for relief exist and that the delay has occasioned no undue hardship on the other party.[1] Where, however, one of the parties defaults upon the date set, if no forfeiture

[21] [1901] A. C. 426.

[22] (1906) 6 Edw. vii, ch. 47.

[23] 1 Br. Rul. Cas. 832, n. 1.

[24] *The New Republic, supra* note 5 .

[1] *Parkin v. Thorold* (1852, Ch.) 16 Beav. 59; *Sylvester v. Born* (1890) 132 Pa. 467, 19 Atl. 337; *Diamond v. Shriver* (1911) 114 Md. 643, 80 Atl. 217; *King v. Connors* (1915) 222 Mass 261, 110 N. E. 289; *Robberson v. Clark* (1913) 173 Mo. App. 301, 158 S. W. 854; *Robinson v. Collier* (1909) 53 Tex. Civ. App. 285, 115 S. W. 915; *Dillon v. Ringleman* (1916) 55 Okla. 331, 155 Pac. 563; *Quinn v. Roath* (1870) 37 Conn. 16; *Raymond v. San Gabriel Co.* (1893, C. C. A. 8th) 53 Fed. 883; *McLean v. Windham Light Co.* (1912) 85 Vt. 167, 81 Atl. 613.

is involved, the other, being invested with a power to change the terms of the contract,[2] may make time of the essence by giving notice.[3]

Time may also be of the essence by implication or construction of law when from its very nature the value of the subject matter necessarily fluctuates with the mere lapse of time.[4] And finally it may be expressly stipulated by the parties that time shall be of the essence. No particular clause is necessary, but any statement will have that effect which clearly provides that the contract shall be null and void if not fufilled within the proper time.[5] Where such stipulation exists, many courts adopt a most stringent rule. The recent case of *Rafferty v. Gaston* (1922, Wash.) 204 Pac. 595, following what seems to be the weight of authority in this country,[6] held that a vendee, under such a contract, who has defaulted in payment without the consent or acquiescence of the vendor,

[2] The notice served must be reasonable, the length of time allowed depending upon the circumstances of each individual case. *Harding v. Olson, infra* note 3 (42 days); *Plummer v. Kennington* (1910) 149 Iowa, 419, 128 N. W. 552 (one month); *Garrison v. Newton* (1917) 96 Wash. 284, 165 Pac. 90 (one and one-half months); *Carroll v. Mundy* (1919) 185 Iowa, 527, 170 N. W. 790.

[3] *Parkin v. Thorold, supra* note 1; *Burchfield v. Hageman* (1915) 35 S. D. 147, 151 N. W. 47; *Moore's Estate* (1899) 191 Pa. 600, 43 Atl. 474; *Harding v. Olson* (1898) 177 Ill. 298, 52 N. E. 482; *Schmidt v. Reed* (1897) 132 N. Y. 108, 30 N. E. 373; *Clarno v. Grayson* (1896) 30 Or. 111, 46 Pac. 426; *Grigg v. Landis* (1868) 19 N. J. Eq. 350.

[4] *Mackey Wall Plaster Co. v. U. S. Gypsum Co.* (1917 D. Mont.) 244 Fed. 275; *Bennie v. Becker-Franz Co.* (1913) 14 Ariz. 580, 134 Pac. 280; *Hardy v. Ward* (1909) 150 N. C. 385, 64 S. E. 171; *Acme Building Co. v. Mitchell* (1916) 129 Md. 406, 99 Atl. 545; *Taylor v. Longworth* (1840, U. S.) 14 Pet. 172; *Ky. Distilleries Co. v. Warwick Co.* (1901, C. C. A. 6th) 109 Fed. 280.

[5] *Ellis v. Bryant* (1904) 120 Ga. 890, 48 S. E. 352; *Garcin v. Furniture Co.* (1905) 186 Mass. 405, 71 N. E. 793; *Cadwell v. Smith* (1909) 83 Neb. 567, 120 N. W. 130; *Collins v. Delaney Co.* (1906) 71 N. J. Eq. 320, 64 Atl. 107.

[6] *Heckard v. Sayre* (1864) 34 Ill. 142; *Jones v. Farms Co.* (1917) 116 Miss. 295, 76 So. 880; *Hurley v. Anicker* (1915) 51 Okla. 97, 151 Pac. 593; *Skookum Oil Co. v. Thomas* (1912) 162 Calif. 539, 123 Pac. 363; *Nelson Real Estate Agency v. Seeman* (1920) 147 Minn. 354, 180 N. W. 227; *Suburban Homes Co. v. North* (1914) 50 Mont. 108, 145. Pac. 2; *Vito v. Birkel* (1904) 209 Pa. 206, 54 Atl. 127; *True v. Northern Pac. Ry.* (1914) 126 Minn. 72, 147 N. W. 948; *Moss v. Rubinstein* (1921, Sup. Ct.) 117 Misc. 385, 199 N. Y. Supp. 496; *Wensler v. Tilke* (1916) 97 Kan. 567, 155 Pac. 946; *Schwerin Realty Co. v. Slye* (1916) 173 Calif. 170, 159 Pac. 420; *Claremore Co. v. Burke* (1916) 56 Okla. 169, 155 Pac. 897; *Fratt v. Daniel-Jones Co.* (1913) 47 Mont. 487, 133 Pac. 700; *Papesh v. Wagnon* (1916) 29 Idaho, 93, 157 Pac. 775; *Keefe v. Fairfield* (1903) 184 Mass. 334, 68 N. E. 342 (even though the vendor accepted payments from the vendee after default). In several states there are statutes prohibiting clauses of forfeiture, but the provision is construed to apply only where unusual grounds are presented for equitable relief, which the vendee must prove to the satisfaction of the court. *Barnes v. Clement* (1899) 12 S. D. 270, 81 N. W. 301; *Cook-Reynolds Co. v. Chipman* (1913) 47 Mont. 289, 133 Pac. 694. In Oklahoma, where such a statute also exists, the court came to the conclusion that by inserting the clause in the contract the parties were equally guilty, and hence that the law would help neither of them to recover either the money or the land. *Kershaw v. Hurtt* (1917, Okla.) 168 Pac. 202.

can neither recover the amount already paid, nor obtain specific performance.[7]

No real hardship is caused by the forfeiture if the consideration already paid upon the contract is small as compared with the purchase price. In such cases courts of equity have no difficulty in determining that the parties intended such sum (usually the first payment) either as a deposit or as earnest-money to bind the bargain, or as liquidated damages.[8] But where only one or two small instalments of the purchase price are still to be paid before the vendee is entitled to a deed, it seems obviously unjust to deprive the vendee of both his money and his land, in view of the fact that he has certain equities in the land which must be fully recognized. The analogy of a vendee to the common-law mortgagor may be of assistance in reaching a more equitable result.

At common law, upon the granting of a mortgage, the legal title to the land becomes vested, subject to a condition subsequent, in the mortgagee, who retains it as security for the payment of the debt.[9] The beneficial or equitable interest, however, is in the mortgagor, who is treated in equity as the owner of the land. Upon the principle of treating as done everything which ought to be done, equity regards the interest of the mortgagor not as a mere chose in action, but as property, as an estate, subject to the lien created by the mortgage. The analogy of the vendee to such mortgagor is striking. It is generally held that where there is an executory contract for the sale of realty, the vendee becomes in equity the owner of the land, in conformity with the maxim above mentioned. The vendor is said to retain the legal title as security for the payment of the purchase money until the final conveyance.[10] To such an extent

[7] The vendee had been accustomed to pay in advance, usually giving the vendor a lump sum amounting in excess of his $25 monthly payments, and having it applied to these payments as they fell due. The last payment, together with all prior ones, became used up, so that the vendee was in arrears in his payments and interest in the sum of $110. Thereupon the vendor sold the land to a third person. In a suit to recover the purchase money already paid, the vendee was denied relief, the court holding in a rather abbreviated opinion that the vendee had committed a breach of contract, and must therefore suffer the loss.

[8] *Bentley v. Keegan* (1921) 109 Kan. 762, 202 Pac. 70; *Pinkston v. Boyd* (1906) 43 Tex. Civ. App. 568, 97 S. W. 103; *Ketchum v. Evertson* (1816, N. Y.) 13 Johns. 359; *Scott v. Merrill* (1915) 74 Or. 568, 146 Pac. 99; *Hull v. Allen* (1911) 84 Kan. 207, 113 Pac. 1050; *Mulcahy v Gagliardo* (1919) 39 Calif. App. 458, 179 Pac. 445; *Steinbach v. Pettingill* (1901) 67 N. J. L. 36, 50 Atl. 443; *Steinhardt v. Baker* (1900) 163 N .Y. 410, 57 N. E. 629. In many cases following the majority rule only an initial payment has been made, so that the court may adopt either view.

[9] *Whitehurst v. Gaskill* (1873) 69 N. C. 449; *Brobst v. Brock* (1870, U. S.) 10 Wall. 519; *Weeks v. Baker* (1890) 152 Mass. 20, 24 N. E. 905. The mortgage is held to be a mere security for the debt. *Gabbert v. Schwartz* (1880) 69 Ind. 450.

[10] *Wehn v. Fall* (1898) 55 Neb. 547, 76 N. W. 13; *Siter's Appeal* (1856) 26 Pa. 178; *Love v. Butler* (1900) 129 Ala. 531, 30 So. 735; *Ehrenstrom v. Philips* (1910, Del. Ch.) 77 Atl. 81; *Lambert v. St. Louis Ry.* (1908) 212 Mo. 692, 111 S. W. 550; *Laughlin v. Wis. Lumber Co.* (1910, D. Wis.) 176 Fed. 772.

is the vendee an owner that he is invested with practically all the rights and obligations of an owner at law. As equitable owner, he is entitled to any benefit, and must sustain any loss or injury which may accrue to or befall the property between the execution of the contract and the time set for the final conveyance.[11] Like other landowners he has power to devise his interest in such land.[12] It would therefore seem that the principles applicable to the mortgagor in equity should also be adopted with respect to the vendee. But many courts have held otherwise. In the case of a mortgage, although the legal estate in the mortgage becomes absolute upon default, yet an equity with respect to the land is recognized as existing in the mortgagor. The court allows the mortgagor to redeem his property, after the day stipulated, by paying interest in addition to the debt; and, to avoid hardship, the mortgagee is allowed at any time after the maturity of the debt to file a bill to foreclose the mortgagor's right of redemption. The decree of the court will provide that unless the mortgage be paid with interest within a certain time specified by the decree, the mortgagor shall be forever foreclosed (strict foreclosure), or, in accordance with modern practice, that the land be sold to satisfy the mortgagee's claim, any surplus resulting being given to the mortgagor.[13] Why then should not the vendee, whose status in equity so nearly approaches that of the mortgagor, be allowed the same opportunity of redemption? The mortgagor is as much a contract breaker as the vendee, and in the mortgage agreement time is also held to be of the essence in a court of common law. It seems that since what has been created in case of an executory contract is in effect an equitable mortgage, the stipulation therein contained should receive no more weight than similar provisions in a mortgage.

A few jurisdictions, however, have refused to enforce the contract literally and have given the vendee relief under conditions of the same nature as those in the principal case, the courts refusing to enforce express clauses of forfeiture, or clauses providing that time shall be of the essence.[14] And in the jurisdictions adopting the majority

[11] *Paine v. Meller* (1801, Ch.) 6 Ves. 349; *Manning v. North Brit. Ins. Co.* (1907) 123 Mo. App. 456, 99 S. W. 1095; *Dunn v. Yakish* (1900) 10 Okla. 388, 61 Pac. 926; *Reed v. Lukens* (1863) 44 Pa. 200; *Brakhage v. Tracy* (1900) 13 S. D. 343, 83 N. W. 363; *contra, Thompson v. Gould* (1838, Mass.) 20 Pick. 134.

[12] *Buck v. Buck* (1844, N. Y.) 11 Paige, 387; *Wimbish v. Montgomery* (1881) 69 Ala. 575.

[13] *Kortright v. Cady* (1860) 21 N. Y. 343; 1 Jones, *Mortgages* (7th ed. 1915) secs. 6-11.

[14] *Vernon v. Stephens* (1722, Ch.) 2 P. Wms. 66; *Richmond v. Robinson* (1864) 12 Mich. 193; *Brown v. Verzani* (1917) 181 Iowa, 237, 164 N. W. 601; *Barnes v. Clement* (1899) 12 S. D. 270, 81 N. W. 301; *Lytle v. Scottish-American Co.* (1905) 122 Ga. 458, 50 S. E. 402; *In re Dagenbaum* (1873) L. R. 8 Ch. 1022; *Edgerton v. Peckham* (1844, N. Y.) 11 Paige, 352, 358. "It is only true as a general proposition that the courts of chancery cannot make new contracts for parties, but can only enforce them. For the court of equity looks to the substance

view there is convincing evidence of an attempt to interpret the terms of the contract as unfavorably as possible toward the vendor. Thus some courts hold that the vendor by giving notice of his intention to consider the contract at an end has in fact rescinded the contract, and hence, before he can obtain a return of his land, he must put the defaulting party in *statu quo,* less such damages as might have been occasioned by the breach.[15] Others hold that after the vendee's default, the vendor, in order to show that he is able and willing to perform, must tender a deed before he can maintain his action.[16] Finally in many jurisdictions the inequitable nature of the rule has given rise to a loose construction of the doctrine of waiver. As a result the courts construe the slightest deviation by the vendor from the strict terms of the contract, or the least sign of leniency shown to the vendee in the matter of time for payment, as evidence of an intent on the vendor's part not to adhere literally to the contract.[17]

Perhaps the most satisfactory solution is that adopted by the later English cases. The courts have there come to the conclusion that because the parties expressly stipulated that the time should be of the essence, no specific performance after default need be granted since in substance this must have been the intention of the parties.[18] However,

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of a contract, and when that is fulfilled, and the general intention of the parties carried into effect, the court relieves against any forfeiture penalty inserted for the purpose of enforcing the contract."

[15] *Pierce v. Staub* (1906) 78 Conn. 459, 62 Atl. 760; *Frink v. Thomas* (1891) 20 Or. 265, 25 Pac. 717; see *Three States Lumber Co. v. Bowen* (1910) 95 Ark. 529, 129 S. W. 799. Some courts hold that mere notice of default or forfeiture does not constitute a rescission entitling vendee to a return of payments made *List v. Moore* (1912) 20 Calif. App. 616, 129 Pac. 962; *Newell v. Stone Co.* (1919) 181 Calif. 385, 184 Pac. 659; *Malloy v. Muir* (1901) 62 Neb. 80, 86 N. W. 916.

[16] *Zeimantz v. Blake* (1905) 39 Wash. 6, 80 Pac. 822; *Wells Fargo Co. v. Page* (1905) 48 Or. 74, 82 Pac. 856; *O'Connor v. Hughes* (1886) 35 Minn. 446, 29 N. W. 152; *Reese v. Westfield* (1909) 56 Wash. 415, 105 Pac. 837; *Forsell v. Carter* (1913) 65 Fla. 512, 62 So. 926.

[17] *Three States Lumber Co. v. Bowen, supra* note 17; *Boone v. Templeman* (1910) 158 Calif. 290, 110 Pac. 947; *Fox v. Grange* (1913) 261 Ill. 116, 103 N. E. 576; *Baerenklau v. Peerless Co.* (1912) 80 N. J. Eq. 26, 83 Atl. 375; *Weaver v. Griffith* (1904) 210 Pa. 13, 59 Atl. 315; *Turpin v. Beach* (1909) 88 Ark. 604, 115 S. W. 404; *Lancaster v. Roberts* (1893) 144 Ill. 213, 33 N. E. 27; *Hill v. Alber* (1913) 261 Ill. 124, 103 N. E. 612; *Phillips v. Carver* (1898) 99 Wis. 561, 75 N. W. 432; *Shorett v. Knudsen* (1913) 74 Wash. 448, 133 Pac. 1029. A stipulation for the payment of interest after maturity is held to amount to a waiver of the forfeiture. *Phillis v. Gross* (1913) 32 S. D. 438, 143 N. W. 373; *Robberson v. Clark, supra* note 1; *contra, Moffett v. Or. & Calif. Ry* (1905) 46 Or. 443, 80 Pac. 489. And if the vendor after default acts as if he still considers the agreement in force, he is held to have waived the forfeiture. *Mound Mines Co. v. Hawthorne* (1909, C. C. A. 8th) 173 Fed. 882.

[18] *Steedman v. Drinkle* [1916, P. C.] A. C. 275; *Cornwall v. Henson* (1900) 2 Ch. 298; *In re Dagenbaum, supra* note 14; *Price v. Ruggles* (1917, Manitoba) 28 L. Rep. 132.

they hold that a stipulation for the forfeiture of all payments previously made must have been intended in the nature of a penalty. The penalty would become more severe as fast as the vendee's performance becomes more nearly complete; the smaller his breach the greater the penalty. Therefore equity will relieve against such a forfeiture. This is true even though the parties expressly describe the forfeiture as liquidated damages. There is in fact no true liquidation or honest estimate, for the amount stipulated varies in inverse proportion to the loss actually sustained. Such a result seems to accord fair and equitable treatment to both parties. It is true that the vendee's legal status is that of a contract-breaker. He should not be entitled, therefore, to a return of his purchase money until he has allowed as a deduction therefrom all the damages caused by his breach, one element of which would be the fair rental value of the property during the time he occupied it. The law should not allow one to profit by another's breach, but merely to receive compensation for the loss sustained.[19] When the vendee has paid damages for the breach and returned the land to the vendor, the latter is sufficiently recompensed.

Although in general the vendee should be given equitable relief against a forfeiture, this does not mean that he should always be given a judgment or decree for a part of his money back. Under the doctrine of mutuality of remedy, the vendor is entitled to a decree for specific performance against the vendee.[20] Therefore if after default the vendee seeks relief, the option should be in the vendor to choose whether he will submit to specific performance of the contract, or to a rescission thereof accompanied by a repayment to the vendee of so much of the purchase price already paid as exceeds a fair sum as damages for the vendee's breach of contract. It is only fair to the vendor to give him this option, for he is not a contract-breaker and he is the best judge of the manner in which he can obtain just relief. When it is considered that in the majority of cases the vendors are large home-building corporations, or individuals controlling huge tracts divided into home sites, and that the vendees are frequently persons who do not clearly comprehend the legal significance of the document (which often contains printed clauses that are never noticed), the injustice of enforcing a penalty against the vendee is evident.

EFFECT UPON A PRIOR AND EXISTING WILL OF THE REVOCATION OF A SUBSEQUENT WILL CONTAINING AN EXPRESS REVOCATORY CLAUSE

In the absence of statute, the destruction, *animo revocandi*, of a will

[19] Even at law in a number of American jurisdictions a contract-breaker has been allowed to recover instalments due him upon a contract. *Britton v. Turner* (1834) 6 N. H. 481; Woodward, *Quasi-Contracts* (1913) sec. 174 *et seq.*

[20] In equity, if the vendee can have specific performance, the vendor ought also to be able to obtain it. 5 Pomeroy, *Equity* (5th ed. 1918) sec. 2169.